Supreme Court, U.S.
FILED
APR 14 1989
JOSEPH F. SPANIOL, JR.
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No. 88-1344

In the Supreme Court of the United States

OCTOBER TERM, 1988

JULIE MIRON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence used against petitioner at trial was improperly derived from his earlier immunized grand jury testimony, in violation of *Kastigar* v. *United States,* 406 U.S. 441 (1972).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is reported at 859 F.2d 1078. The opinion of the district court (Pet. App. A37-A67) is reported at 671 F. Supp. 124.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1988. A petition for rehearing was denied on November 21, 1988 (Pet. App. A68-A69). On December 13, 1988, Justice Marshall entered an order extending the time to file a petition for a writ of certiorari to February 10, 1989, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of violating the Taft-Hartley Act, 29 U.S.C. 186(a)(2), obstructing justice, 18 U.S.C. 1510, and conspiring to violate the federal racketeering statute, 18 U.S.C. 1962(d). He was sentenced to five years' imprisonment and fines totaling $40,000. The court of appeals affirmed. Pet. App. A1-A36.

The pertinent facts are summarized in the opinions of the court of appeals and the district court. Pet. App. A2-A5, A14-A17, A29-A31, A38-A51. In early 1980, a federal grand jury was investigating John Cody, a former labor official with suspected ties to organized crime. Petitioner, who was the president of several building supply companies, was called to testify before the grand jury. When asked if he knew John Cody, petitioner asserted his Fifth Amendment privilege against compulsory self-incrimination. The government then obtained an order compelling petitioner to testify under a grant of immunity pursuant to 18 U.S.C. 6002. Pet. App. A2.

Several months later, petitioner appeared before the grand jury and answered questions about his companies' union contracts, his relationship with John Cody, and his relationship with the late Paul Castellano, the alleged boss of the Gambino organized crime family. Petitioner testified that one of his companies had a contract with a union headed by Cody and that he had other business dealings with Cody and with Cody's son. Petitioner also testified that his companies had supplied building materials to Castellano's sons and that he had met with Castellano and John Cody at a Manhattan restaurant to resolve a dispute about the price of those materials. Pet. App. A3.

The grand jury investigation culminated in the indictment of Cody on charges of labor racketeering. Cody was subsequently convicted. Although petitioner did not testify at Cody's trial, a government agent provided petitioner's grand jury testimony to the probation officer who prepared Cody's presentence report. The report relied on petitioner's immunized testimony to establish a connection between Cody and Castellano. Pet. App. A3.

Subsequently, the government initiated an investigation into potential racketeering violations by the Gambino organized crime family. On November 12, 1982, the government applied for authorization to place electronic eavesdropping devices in Castellano's home. In support of the application, the government submitted a 59-page affidavit by an FBI agent, which established probable cause for surveillance concerning possible loansharking and murder. The affidavit also recited other criminal activities of the Gambino crime family. Based on the affidavit, the district court signed an order authorizing a 30-day period of electronic surveillance. Because of difficulties in installing the necessary equipment, the government applied for and received three extensions of the original surveillance order. None of those applications referred to petitioner's immunized testimony. Pet. App. A3, A15.

After the eavesdropping equipment was installed, information revealed in intercepted conversations led the government, on April 8, 1983, to seek another extension of the original order as well as authorization to broaden the coverage of the court order to include Hobbs Act and Taft-Hartley Act violations. The lengthy affidavit submitted in support of the application described the Gambino family's labor-racketeering activities, which included providing "muscle" for and sharing payoffs with corrupt union officials; it then stated that John Cody was one such official. The affidavit also described a number of pre-

viously intercepted conversations involving particular labor-racketeering activities and stated that reliable informants had told the FBI that Cody was a close associate not only of Castellano but also of Carlo Gambino, the former head of the organized crime family. The affidavit further stated that cars registered in petitioner's name had arrived at the Castellano residence and that petitioner had visited the home after arranging a meeting with Castellano in a phone conversation during which petitioner had used a code name. Pet. App. A4, A40-A48.

In addition, the affidavit included a reference by the FBI agent to part of petitioner's immunized grand jury testimony. Paragraph 18 of the affidavit stated:

> I am also informed . . . that during [the] investigation of the Cody case, [a government attorney] heard testimony from Julie Miron, the president of Miron Mason Supplies. Mr. Miron said that he had supplied materials for the construction for homes CASTELLANO's sons were building on Staten Island. A dispute arise over the price Mr. Miron was charging for the materials. Mr. Miron was then contacted by John Cody on behalf of CASTELLANO. Cody said that he thought Mr. Miron's prices for the CASTELLANO materials were too high. Cody then arranged a meeting with PAUL CASTELLANO, Cody, and Miron attended to discuss this dispute.

The agent who included this paragraph did not know that it was based on immunized grand jury testimony. Pet. App. A3-A4.[1]

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[1] The same FBI agent who prepared the affidavit for the wiretap extension order had interviewed petitioner at his home on May 26, 1982, prior to the agent's having been shown the grand jury testimony. That interview occurred as a result of information the agent had received from the New York City Police Department during his investigation

On April 8, 1983, the district court extended and expanded the electronic surveillance authorization as requested by the government. Based on subsequently intercepted conversations, petitioner was charged with and convicted of involvement in a large-scale labor payoff scheme during 1981-1983. The scheme involved the use of nonunion labor on multi-million dollar contracts for work on Mobil Oil Corporation's deep water terminal and pipeline facility at Port Mobil, New York. Pet. App. A4-A5.

2. Before trial, petitioner moved to dismiss the indictment or to suppress the evidence against him on the ground that the government had made improper use of his immunized testimony. Following an extensive hearing, the district court denied the motion. The court also denied a post-trial motion for similar relief. Pet. App. A37-A67.

The court first ruled that the grant of immunity to petitioner in exchange for his grand jury testimony did not prevent the government from using that testimony against petitioner in a prosecution for a crime that was not related to his testimony and that was committed after petitioner gave the immunized testimony. The court found that principle applicable here, because petitioner's June 1980 immunized grand jury testimony related to events that occurred during the 1970s, whereas the crimes for which petitioner was convicted took place between December 1981 and June 1983. Pet. App. A66. Indeed, the court found that, at the time of his grand jury testimony, petitioner could not have contemplated the particular crimes for which he was later convicted and, therefore, could not

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of Paul Castellano. The information was that petitioner was an associate of Castellano and had visited the Castellano residence on a few occasions in 1981. Much of the information that petitioner supplied to the agent during that May 1982 interview was the same information that appeared in paragraph 18 of the affidavit. U.S. C.A. Br. 15-16.

have invoked his privilege against compulsory self-incrimination on the basis of such uncontemplated future crimes. For that reason, the court concluded, petitioner's immunity did not extend to the conduct that was the subject of the indictment against petitioner. Pet. App. A62-A63, A66.

The district court also held that, even if petitioner's testimony was immunized as to the 1981-1983 crimes, the use of the testimony in the affidavit was harmless, since it "had no impact at all" on either the government's decision to seek, or the court's decision to grant, the surveillance extension order. Pet. App. A66-A67. Thus, the court found that the government had established beyond a reasonable doubt wholly independent sources for both of those decisions: "It is apparent that even without [petitioner's immunized testimony], the government would have acted exactly as it did, and no judge of this court would have deviated in the slightest from the course of granting orders authorizing the bugs that revealed information incriminatory to [petitioner]." *Ibid.* Accordingly, the court concluded, because petitioner's compelled testimony was "of absolutely no significance in the prosecution," petitioner had been left "in precisely the same position as if he had never testified in the *Cody* case." *Id.* at A67.

3. The court of appeals affirmed, although the three-judge panel issued three separate opinions. Judge Winter, who wrote the lead opinion, first concluded that the use of petitioner's immunized testimony did violate petitioner's Fifth Amendment rights; he rejected the government's argument that the grant of immunity did not immunize petitioner against the use of his testimony in connection with crimes not yet committed. Judge Winter reasoned that petitioner's grand jury testimony provided "links in a chain of evidence" that was "potentially incriminating both as to past and future crimes arising out of the activity being investigated." Pet. App. A8. Moreover, he stated,

"because labor racketeering is, like gambling, generally an ongoing activity, a substantial risk of incrimination attends the questioning of persons in situations similar to [petitioner's]." *Ibid.* For those reasons, Judge Winter found that petitioner's testimony was covered by a valid Fifth Amendment privilege and that the use of that testimony in the surveillance application violated the use-immunity statute and the Fifth Amendment. *Id.* at A7-A8.

Judge Winter went on, however, to conclude that dismissal of the indictment was not warranted because the violation "had no effect on the course of events leading to [petitioner's] indictment and conviction." Pet. App. A8-A9. Thus, he found that petitioner's immunized testimony was of "negligible significance" and that entirely independent evidence amply established probable cause to extend the prior surveillance order and to expand it to include labor racketeering. Because the inadvertent use of petitioner's immunized testimony constituted "harmless error beyond a reasonable doubt," there was no reason to reverse petitioner's convictions and dismiss the indictment. *Id.* at A8-A12.

Judge Winter rejected petitioner's breach-of-contract argument—that (a) the grant of immunity was based on a "bargained exchange" with the government, pursuant to which petitioner agreed to surrender his right to remain silent in return for the government's promise not to use that information against him, and (b) any breach of that agreement, however immaterial, required vacation of petitioner's conviction. To accept such an argument, Judge Winter explained, would vitiate the harmless error rule, requiring that otherwise valid convictions be reversed "because of an error that had no effect on the course of events." Pet. App. A13. In any event, Judge Winter added, the application of a contract analogy to the facts of the case would not require the reversal of petitioner's con-

victions, because "[a] partial breach with no harm or damage to the complaining party cannot be a basis for a contract action." *Ibid.*

Judge Van Graafeiland, in a concurring opinion (Pet. App. A13-A29), agreed with Judge Winter's conclusion that, even if the reference to petitioner's grand jury testimony in the surveillance application violated his rights, the violation was harmless. Thus, he concurred in the district court's finding that the use of petitioner's testimony had "no effect at all on events," but rather was like "a leaf dropping unobserved in a deep forest." *Id.* at A26. Judge Van Graafeiland stated, however, that he would also affirm on the additional ground that the use of petitioner's grand jury testimony did not violate petitioner's Fifth Amendment rights because the grant of immunity did not provide derivative use immunity for crimes, such as in this case, that were not yet committed or even contemplated when the grant of immunity was made. *Id.* at A18-A26.

Judge Altimari dissented. Pet. App. A29-A36. In his view, any use of petitioner's immunized testimony, even if found not to have affected the trial, required the reversal of petitioner's convictions.

ARGUMENT

1. The court of appeals concluded, following the district court, that petitioner's convictions should not be reversed, because they were wholly untainted by the reference in the surveillance affidavit to petitioner's immunized grand jury testimony. That conclusion is correct, whether it is framed as a ruling that there was no direct or derivative use of the immunized testimony that would be proscribed by the Fifth Amendment and the immunity statute, or as a ruling that the government's alleged error

in including the testimony in the surveillance application was harmless beyond a reasonable doubt.

a. The statute under which petitioner was granted immunity, 18 U.S.C. 6002, prohibits the government from using at trial any testimony that was compelled under a grant of immunity or any information derived from that testimony. That proscription, the Court has made clear, is coextensive with the requirements of the Fifth Amendment itself. See *United States* v. *Apfelbaum,* 445 U.S. 115, 121-123 (1980); *Kastigar* v. *United States,* 406 U.S. 441, 448-459 (1972). Although the bar on direct and derivative use of immunized testimony is sweeping, the rule goes no further than to ensure that the defendant is "in substantially the same position as if [he] had claimed the Fifth Amendment privilege." *Kastigar,* 406 U.S. at 462; *Murphy* v. *Waterfront Comm'n,* 378 U.S. 52, 79 (1964). This familiar causation limit on the rule means that "[b]oth the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources." *Kastigar,* 406 U.S. at 461.

In the present case, there is no claim that any immunized testimony was actually used at trial—as evidence, for cross-examination, or in any other way. The only claim is that the evidence at trial derived from the immunized testimony because the testimony was included in the affidavit supporting the electronic surveillance order that led to the evidence used at trial. Both the district court and the court of appeals, however, expressly found that the testimony had no effect on the granting of the surveillance authorization and hence that all of the trial evidence came from wholly independent sources. That finding is correct.

The affidavit overwhelmingly established probable cause to issue the electronic surveillance extension order by evidence independent of petitioner's grand jury testimony. The evidence was derived from conversations inter-

cepted as a result of the original surveillance order as well as from personal observations. It showed that the Gambino organized crime family and Castellano himself were engaged in labor racketeering, that conversations concerning labor racketeering had occurred at Castellano's residence, that Castellano had discussed the Gambino family's longstanding control of Local 282 of the Teamsters Union, and that John Cody was associated with Castellano and the Gambino organized crime family. In the midst of all of the independent evidence, the portion of petitioner's grand jury testimony that was included in the surveillance affidavit was "of negligible significance." Pet. App. A9. Accordingly, the courts below correctly found that, even without that testimony, " 'the government would have acted exactly as it did, and no judge of this court would have deviated in the slightest from the course of granting orders authorizing the bugs that revealed information incriminatory to [petitioner].' " *Ibid.* (opinion of Judge Winter, quoting *id.* at A67 (district court opinion)). The reference to the immunized testimony in the electronic surveillance affidavit "had no effect on the course of events leading to [petitioner's] indictment and conviction." *Id.* at A8.

As the district court concluded, petitioner's Fifth Amendment and statutory immunity rights were not violated because he was "left in precisely the same position as if he had never testified." Pet. App. A67. For the same reasons, even if the government's inclusion of petitioner's immunized grand jury testimony in the surveillance affidavit is viewed as a violation, that error, as the court of appeals concluded (*id.* at A8, A13, A26), was harmless beyond a reasonable doubt. Under either rubric, petitioner's conviction was correctly affirmed.

b. Petitioner suggests (Pet. 18-20) that he in fact received less than the complete immunity than the Fifth

Amendment guarantees him. That suggestion wrongly assumes—without offering any support for the assumption—that the issuance of the surveillance order turned in part on the immunized testimony. Both courts below correctly found that the immunized testimony played no role at all in the court's authorization of the electronic surveillance.

Petitioner also argues (Pet. 11-13) that the court of appeals improperly relied on *Murray* v. *United States,* 108 S. Ct. 2529 (1988), in which this Court held that the "independent source" doctrine permits the introduction of evidence that, although initially discovered during an unlawful search, is subsequently obtained through an independent and lawful source. Judge Winter relied on *Murray* (Pet. App. A12) only by analogy, because *Murray* is a Fourth Amendment case.[2] Nonetheless, *Murray* does bolster the court of appeals' conclusion that an error that had no effect at all on the evidence introduced at trial provided no basis for reversal of the conviction. Moreover, petitioner is wrong in suggesting that *Murray* actually supports reversal here. Petitioner argues (Pet. 12) that the Court in *Murray* "expressly noted that no 'genuinely independent source' would exist if information from the illegal search had been 'presented to the Magistrate' in the application for the subsequent search warrant." That characterization of *Murray*, however, is quite misleading, as it omits a crucial qualification. The cited passage in fact states (108 S. Ct. at 2535-2536 (emphasis added)) that there would have been no "genuinely independent source * * * if information obtained during that entry was pre-

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[2] In fact, the Court in *Murray* noted that the independent source doctrine "has been applied to evidence acquired not only through Fourth Amendment violations but also through Fifth and Sixth Amendment violations." 108 S. Ct. at 2533.

sented to the Magistrate *and affected his decision to issue the warrant."* In the present case, the courts below found that the inclusion of a small portion of petitioner's immunized testimony had no effect on either the issuance of the surveillance order or the trial. The cited passage of *Murray* (with the Court's qualifying phrase included) therefore directly supports the result reached by the court of appeals.

Petitioner further contends (Pet. 13-18) that the court of appeals' decision violates this Court's ruling that the Fifth Amendment "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect." *Kastigar,* 406 U.S. at 453. But *Kastigar* itself recognizes that the government does not make any prohibited "use" when, as here, all of its evidence derives from wholly independent sources—when, that is, the defendant is in no worse position than he would have occupied if he had never testified. 406 U.S. at 461-462. Moreover, the Court has never held harmless error analysis inapplicable to a Fifth Amendment error like the one alleged in this case.

It is the general rule that a conviction should not be reversed for errors that a reviewing court finds had no effect on the conviction. *Chapman* v. *California,* 386 U.S. 18 (1967); 28 U.S.C 2111; Fed. R. Crim. P. 52(a); see *United States* v. *Hasting,* 461 U.S. 499, 509 (1983) ("it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless").[3] Of course, the

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[3] See also *Satterwhite* v. *White,* 108 S. Ct. 1792 (1988) (harmless error rule applies to admission of psychiatrist's testimony in violation of Sixth Amendment); *Rose* v. *Clark,* 478 U.S. 570 (1986) (*Chapman*'s harmless error standard applies to an erroneous malice instruction that impermissibly shifted the burden of proof); *Rushen* v. *Spain,* 464 U.S. 114 (1983) (right to be present at trial); *United States* v. *Hasting,* 461 U.S. 499 (1983) (improper comment on defendant's silence at trial, in violation of Self-Incrimination Clause); *Hopper* v. *Evans,*

Court has held that, in the case of violations of certain constitutional rights, the reliability of the trial is so compromised that the error cannot be found harmless. *Chapman,* 386 U.S. at 23 n.8 (reversal required when factfinder has a financial stake in outcome, when defendant is denied counsel altogether, and when government introduces evidence of a coerced confession); see *Tumey* v. *Ohio,* 273 U.S. 510 (1927); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Mincey* v. *Arizona,* 437 U.S. 385 (1978); *Payne* v. *Arkansas,* 356 U.S. 560 (1958). The present case, however, involves none of those exceptional circumstances. In particular, the jury was not exposed to any coerced confession by petitioner; hence, the case does not come within this Court's conclusion (*Payne,* 356 U.S. at 568) that, "where * * * a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession." Here, the courts could, and did, easily make the required determination that the inclusion of the immunized testimony in the electronic surveillance application did not have any effect on the district court's decision to issue the surveillance order. In this respect, the required determination is no different from the determination

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456 U.S. 605, 613-614 (1982) (statute improperly prohibiting court from giving a jury instruction on a lesser included offense in a capital case, in violation of Due Process Clause); *Moore* v. *Illinois,* 434 U.S. 220, 232 (1977) (admission of identification in violation of Sixth Amendment Counsel Clause); *Brown* v. *United States,* 411 U.S. 223, 231-232 (1973) (admission of out-of-court statement in violation of Sixth Amendment Confrontation Clause); *Milton* v. *Wainwright,* 407 U.S. 371 (1972) (admission of confession in violation of Sixth Amendment Counsel Clause); *Chambers* v. *Maroney,* 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of Fourth Amendment); *Coleman* v. *Alabama,* 399 U.S. 1 (1970) (denial of right to counsel at a preliminary hearing in violation of Sixth Amendment Counsel Clause).

whether a warrant issued on an application that includes false statements is supported by probable cause independent of those statements; courts regularly make that determination under *Franks* v. *Delaware,* 438 U.S. 154, 171-172 & n.8 (1978).[4]

For those reasons, harmless error analysis applies in this case. Indeed, numerous court of appeals decisions recognize that improper use of immunized testimony is subject to *Chapman*'s harmless error rule. See *United States* v. *Hampton,* 775 F.2d 1479, 1489 n.51 (11th Cir. 1985); *United States* v. *Byrd,* 765 F.2d 1524, 1529 n.8 (11th Cir. 1985); *United States* v. *Gregory,* 730 F.2d 692, 698 (11th Cir. 1984), cert. denied, 469 U.S. 1208 (1985); *United States* v. *Rogers,* 722 F.2d 557, 560 (9th Cir. 1983), cert. denied, 469 U.S. 835 (1984); *United States* v. *Semkiw,* 712 F.2d 891, 894-895 (3d Cir. 1983); *United States* v. *Beery,* 678 F.2d 856, 863 (10th Cir. 1982), cert. denied, 471 U.S. 1066 (1985); *United States* v. *Shelton,* 669 F.2d 446, 464 (7th Cir.), cert. denied, 456 U.S. 934 (1982). Petitioner cites no decision that is to the contrary.

Finally, petitioner seeks to evade the application of harmless error analysis by relying (Pet. 20-25 & nn.15-18) on *Santobello* v. *New York,* 404 U.S. 257 (1971), and a number of lower court decisions involving nonprosecution agreements.[5] This argument, which is no more than a re-

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[4] Contrary to petitioner's argument (Pet. 15-16), *New Jersey* v. *Portash,* 440 U.S. 450 (1979), does not support his position. The Court there ruled that a defendant's prior immunized testimony could not be placed before the jury at trial for impeachment purposes. In the present case, petitioner's grand jury testimony was not placed before the jury at all, and all of the evidence that was placed before the jury derived from wholly independent sources. There was, in short, no evidentiary use of petitioner's testimony in this case.

[5] *United States* v. *Carter,* 454 F.2d 426 (4th Cir. 1972) (en banc), cert. denied, 417 U.S. 933 (1974); *United States* v. *Weiss,* 599 F.2d 730

formulation of the prior arguments, does not help petitioner. The cited decisions stand only for the proposition that when the government promises not to bring certain charges against a defendant in return for his cooperation or guilty plea, that promise must be kept. Here, the government did not induce a guilty plea or a cooperation agreement from petitioner in return for a promise not to prosecute him. Rather, when petitioner invoked his Fifth Amendment right against compulsory self-incrimination before the grand jury, the government compelled his testimony under a grant of use immunity pursuant to 18 U.S.C. 6002. Even if the grant made in that compelled transaction is viewed as a promise, the "promise" made by the statute was simply that no information directly or indirectly derived from the testimony compelled under the order could be used against petitioner in a criminal prosecution. As shown above, that "promise" was kept, because evidence obtained pursuant to the electronic surveillance order derived from sources wholly independent of petitioner's grand jury testimony.[6]

(5th Cir. 1979); *United States* v. *Brimberry*, 744 F.2d 580 (7th Cir. 1984); *United States* v. *Brown*, 801 F.2d 352, 355 (8th Cir. 1986); *Rowe* v. *Griffith*, 676 F.2d 524 (11th Cir. 1982).

[6] Petitioner suggests (Pet. 26-30) that the harmless error analysis employed by the court of appeals runs counter to Congress's intent that the statutory immunity be stringently enforced. This claim is meritless. In passing the immunity statute, Congress instructed (S. Rep. No. 617, 91st Cong., 1st Sess. 145 (1969); H.R. Rep. No. 1549, 91st Cong., 2d Sess. 42 (1970)): "This statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination." See *United States* v. *Apfelbaum*, 445 U.S. at 122-123. Here, as we have shown, the Fifth Amendment privilege was not violated because petitioner was left in "substantially the same position as if [he] had claimed the Fifth Amendment privilege." *Kastigar* v. *United States*, 406 U.S. at 462. Nothing in the statute's legislative

2. The court of appeals' decision is also correct on the alternative ground relied on by Judge Van Graafeiland and by the district court. Pet. App. A24, A66. Under that analysis, the inclusion of petitioner's grand jury testimony in the electronic surveillance affidavit did not violate petitioner's Fifth Amendment privilege against compulsory self-incrimination—or the coextensive statutory immunity—because the grant of immunity did not provide derivative use immunity for the crimes for which he was prosecuted, which had not yet been committed or contemplated at the time the grant of immunity was made.

Noting that a grant of immunity "need not treat the witness as if he had remained silent," this Court has stated that the grant of immunity covers only those matters that are protected by the Fifth Amendment privilege and that the privilege may be invoked only "with respect to matters that pose substantial and real hazards of subjecting a witness to criminal liability at the time he asserts the privilege." *United States* v. *Apfelbaum,* 445 U.S. at 127. The hazards must be more than " 'merely trifling or imaginary.' " *Id.* at 128. In general, that standard is not met by acts that the immunized witness might commit in the future, for the Court has emphasized that the purpose of the Self-Incrimination Clause is " 'to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself *had committed a crime.*' " *Lefkowitz* v. *Turley,* 414 U.S. 70, 77 (1973) (quoting *Counselman* v. *Hitchcock,* 142 U.S. 547, 562 (1892) (emphasis added)); see *United States* v. *Bryan,* 339 U.S. 323, 340 (1950) (the

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history suggests that Congress intended to grant a windfall to a defendant by putting him in a better position than he would have occupied had he claimed his privilege against compulsory self-incrimination in the absence of a grant of immunity.

privilege usually applies "only to *past* criminal acts concerning which the witness should be called to testify"); *Glickstein* v. *United States,* 222 U.S. 139, 142 (1911).[7] Even in *Marchetti* v. *United States,* 390 U.S. 39, 53 (1968), where the Court held that the privilege was not "entirely inapplicable to prospective acts," the Court recognized that "prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination." *Id.* at 54; see *Apfelbaum,* 445 U.S. at 129; *United States* v. *Freed,* 401 U.S. 601, 606-607 (1971).

In the present case, insofar as petitioner's grand jury testimony is at issue, petitioner's privilege in 1980 did not cover the 1981-1983 labor-racketeering crimes with which he was later charged, and it certainly did not cover petitioner's subsequent acts of obstruction of justice, because his testimony posed no substantial risk of self-incrimination concerning those yet-uncontemplated crimes. As Judge Van Graafeiland correctly observed (Pet. App. A21), the only portion of petitioner's immunized grand jury testimony that was included in the electronic surveillance affidavit "reveal[ed] no more than that [petitioner] met Castellano in connection with an innocuous and lawful transaction, one that in no way incriminated [petitioner]." That testimony did not significantly enhance the likelihood that petitioner would be prosecuted for future acts of labor racketeering. Moreover, as the district court

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[7] See also *United States* v. *Seltzer,* 794 F.2d 1114, 1120 (6th Cir. 1986), cert. denied, 479 U.S. 1054 (1987); *United States* v. *Black,* 776 F.2d 1321, 1326-1327 (6th Cir. 1985); *United States* v. *Quatermain,* 613 F.2d 38, 41-43 (3d Cir.), cert. denied, 446 U.S. 954 (1980); *United States* v. *Housand,* 550 F.2d 818, 822 (2d Cir.), cert. denied, 431 U.S. 970 (1977); *United States* v. *Tramunti,* 500 F.2d 1334, 1343-1344 (2d Cir), cert. denied, 419 U.S. 1079 (1974); *United States* v. *Pappadio,* 346 F.2d 5, 8 n.3 (2d Cir. 1965), vacated on other grounds *sub nom. Shillitani* v. *United States,* 384 U.S. 364 (1966).

found (*id.* at A66; see also *id.* at A18), "it would have been impossible at the time of his testimony for [petitioner] even to have contemplated the particular crimes for which he was convicted."

Hence, the facts here are far different from the unusual facts presented in *Marchetti,* where the Court found the privilege applicable to certain gambler-registration statutes. Those statutes "had the direct and unmistakable consequence of incriminating" the defendant in *Marchetti,* the Court explained (390 U.S. at 48-49), because the defendant was a professional gambler engaged in "ongoing gambling activities that he had commenced and was likely to continue," and those activities were unlawful in virtually every jurisdiction in the nation. *Apfelbaum,* 445 U.S. at 129. The testimony at issue in this case did not link petitioner to any ongoing criminal activity in which he was engaged at the time of his testimony and for which he was later prosecuted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241 699/00210